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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

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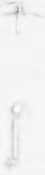

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ARGUMENT

The Government in its brief has expressed its views on what this case involves and what it does not involve, emphasizing at every turn "the special facts of this case" (*e.g.*, Govt. Brief, p. 16), "the context of this case" (*Id.* at 13, n. 22), and "the particular circumstances of this case." (*Id.* at 10). Some of the Government's views will be examined against the background of this case.

1. *"Access" in proper perspective.*

The Government's justification for emasculating petitioner's copyrights may be distilled into one statement—the need of physicians and researchers for "access" to petitioner's jour-

nals. It is erroneously suggested that this case somehow involves an attempt to prohibit photocopying (see, *e.g.*, Govt. Brief, p. 21) and so interferes with "access." But in this case, the Court of Claims under 28 U.S.C. Section 1498(b) has no power to issue an injunction to halt any activity of the Government or anyone else, and petitioner seeks no injunction. If liability is found, the court can only award reasonable compensation in this compulsory licensing case, as it must for other Government takings.[1]

Photocopying of scientific and technical articles on a massive scale is here to stay and petitioner recognizes that the tide cannot be turned back or halted. Indeed, petitioner, as a disseminator of scientific information, affirmatively wishes its articles to be distributed as widely and conveniently as possible—through photocopying or any other technology now or hereafter invented.

These words are documented by petitioner's actions. Petitioner has provided "access" through subscriptions, reprints, microfilm editions, back issues, licensing a photocopier to make authorized photocopies, and proposing workable licensing programs to the library community. In addition, petitioner has urged librarians to suggest improvements in its licensing proposals, thus far without success. In the face of these facts, the Government simply cannot urge that the context of this case requires free photocopies as the only means of access to petitioner's works.[2]

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[1] This Court recently denied certiorari in Foster v. American Machine & Foundry Co., 492 F.2d 1317 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (Oct. 15, 1974) where a compulsory patent license was judicially ordered in a private case.

[2] These photocopies are free only vis-a-vis the authors and publishers of the material being photocopied. The taxpayers shoulder payments to the Xerox Corporation and others costs (F-15, Pet. App. 80).

This case involves solely a minimal impact on Government budgetary considerations (Tr. 174–75). A negligible additional appropriation by the United States would further medical science. The Government would merely complement its photocopying payments to the Xerox Corporation with a small additional payment to the publishers of the material the Government sees fit to reproduce.

The record shows that petitioner's initial attempt to develop a license with NLM resulted in the response that no royalties would be paid unless a court ordered such payments (Tr. 75). Accordingly, this action was commenced. When the Trial Judge ruled in petitioner's favor, petitioner offered a licensing plan with the hope that the principle of licensing would be accepted, shown to be workable, and the problem resolved. The Government rejected not only the plan offered, but *any* plan. In addition, it threatened to destroy access to all of petitioner's journals by cutting off subscriptions and successfully urging others to follow its lead. As a further result, NLM would have excised the journals from *Index Medicus* making it most difficult for the scientific community to learn about the articles published by petitioner.

The Government's response forced petitioner to withdraw its licensing proposal. Petitioner's plan and the Government's response are accurately set out in a letter called to the Court's attention by the Government for other purposes (Govt. Brief, pp. 24–25).[3]

This history makes graphic the need for recognition of a right in the present situation before any meaningful licensing program can be established. In the absence of such recognition, NLM and NIH will, instead of coming forward with constructive contributions, continue to ignore the vicious cycle, described in Petitioner's Brief, p. 16, which will in the end destroy petitioner's valuable journals. The foregoing also emphasizes that access is not jeopardized by the award of reasonable compensation; it might well be jeopardized by denial.

2. *The scope of this decision*

(a) *The NLM system is a consortium; NIH is a large "corporate" subscriber.* In seeking to draw a protective line around

[3] 64 *Gastroenterology* 1059 (1973). The letter is reproduced in full in Appendix A. Petitioner's current licensing proposal adds an alternative of blanket licensing, *i.e.*, a one-time fee paid at the time of subscription which would enable the library to provide photocopies. This fee amounts to considerably less than 5¢ per page.

the photocopying here involved, the Government suggests that this case is "significantly different from a library consortium designed to share single subscriptions to various journals." (Govt. Brief, p. 32, n. 49; p. 26, n. 38). In fact, NLM, and its network of 10 regional libraries and 400 local libraries, are precisely such a consortium.[4] Thus, when NLM's photocopying decreases, its "member libraries" (Govt. Brief, p. 31, n. 47) step up the pace of their reproduction (*Id.*, at 5, n. 14). Moreover, the 12,000 NIH workers, through photocopying, effectively share the two library subscription copies.

The Government quite correctly notes as follows:

> "In a case in which, for example, photocopying was the functional equivalent of publication, presumably there would be copyright infringement." (Brief, p. 17, n. 26, parenthesis omitted).

NLM offers its photocopies to libraries all over the world; NIH furnishes copies to any of its staff who wish them. To be sure, copies are furnished one at a time. But this is the prototype of distribution, *i.e.*, by a bookstore to its customers and by petitioner to its subscribers. The photocopying at NIH and NLM is the functional equivalent of publication (Petitioner's Brief, pp. 48–49; Brief of Authors League of America, p. 14; Brief of *Amici Curiae*, American Guild of Authors and Composers, et al., p. 20–21).

(b) *Faulty analogies: loans and personal use.* A pivot of the Government's position is that the numerous instances of reproduction of journal articles by Government libraries should

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[4] The specific role of NLM in cutting down the need for subscriptions among libraries is reflected in developments recently cited by a librarian as follows:

> "Consortia relationships are equally attractive to NLM where a hierarchical model of information delivery has been proposed to prevent the development of numerous and unnecessary archival collections throughout the nation." Fink, *The Place of the Hospital Library Consortium in the National Biomedical Communications Network*, Bull. Med. Libr. Ass'n., 258, 259 (July 1974).

Prevention of such collections means fewer subscriptions.

be considered fair use because they are equivalent to library loans which concededly do not infringe. To begin with, library loans are not "fair use"; they simply do not come within the ambit of the proprietor's exclusive right to "print," or to "copy". By contrast, photocopying does: it constitutes printing and copying.[5] But reproduction of a copy of a work is not the equivalent of loaning the work for a number of other reasons. For example, it is conceded that the demand by the NIH workers for journal articles is not met by the stuff loans are made of—the two in-house subscription copies (Pet. App. 4). Moreover, the very "disadvantages" of circulating the original pointed out by the Government (Govt. Brief, p. 32, n. 49) confirm that without photocopying, the libraries would have to meet their demand through means which would compensate the copyright proprietor.

There is no similarity between personal use by individuals and the reprint service operated by the Government.[6] The massive NLM network and giant NIH operation have no relationship to casual or sporadic photocopying by an individual researcher of a journal he is perusing, an analogy suggested by the Government and its *amici*.[7] For example, a NLM original of

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[5] In addition to the discussion in Petitioner's Brief, pp. 45–48, these propositions are amply documented in Brief *Amici Curiae* For American Society for Testing and Materials et al. pp. 6–20; Brief of Authors League of America, Inc. pp. 10–14; Brief of *Amici Curiae* American Guild of Authors and Composers et al. pp. 7–20. See page 6, n. 9 infra.

[6] See dissenting opinion of Chief Judge Cowen (Pet. App. 31; 36–37); Petitioner's Brief, p. 41; Brief Amici Curiae of Association of American Publishers, Inc., The Association of American University Presses, Inc., Educational Media Producers Council, p. 9. Even the manufacturing provisions in 17 U.S.C. §107 cited by the Government (Govt. Brief, p. 19, n. 29) limit importation for individual use to authorized copies; "piratical copies"—those made without permission of the copyright proprietor—may not be imported even one at a time. Although the manufacturing provisions are "an anomaly in our copyright law," Report of Register of Copyrights on General Revision of U.S. Copyright Law, 87th Cong. 1st Sess. 122–23 (1961), they at least make it clear that Congress knows how to provide individual use copyright exemptions when it sees fit.

[7] The inherent limitations on hand copying restrict this activity to note

a periodical is not, in fact, available to an individual to borrow, peruse, and photocopy for himself. Nor is it even physically available to an NLM member library. NLM's subscription copy is, in effect, a "master" for making reprints.

If reproduction through library photocopying can ever be infringement, the scope and function of the Government's system make this the case.

The analysis of this Court in *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968), in no way immunizes the libraries from liability in this case. To begin with, the libraries themselves initiate and generate the reproduction by determining whether to lend the original or to photocopy instead. Moreover, the entire process of reproduction—including photographing the article onto microfilm and printing a copy from the film—is performed entirely by the libraries, in contrast to the intermediate role between broadcaster and viewer played by the cable operator.[8] Furthermore, the cable operators' function was deemed insufficient in *Fortnightly* to justify expanding the dictionary meaning of "perform"; here, the plain meaning of "copy" and "print" squarely covers the Government's operation.[9]

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taking, not reproducing entire articles by hand. And the home recording permitted by the Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 discussed by the Government (Brief, p. 18 and 19) is based on purposeful statutory language. The remarks in the committee report about rights of other proprietors under existing Title 17 relate to recording rights held by music copyright owners, not to rights of proprietors in other kinds of works. The distinctions between music and periodicals, including the statutory compulsory license in Section 1(e), make such remarks inapplicable to the present case.

[8] The copying and printing by libraries here is similar to the performing by broadcasters who concededly infringe if they broadcast without permission. The function of the cable operator is closer to that of the photocopying machine manufacturer, the paper manufacturer or the electric company furnishing current in a photocopying operation.

[9] The Government does not believe it necessary for this Court to decide certain issues raised below. These include whether the words "copy," "print," and "publish" in Section 1(a) of the statute are capable of protecting owners of copyright in book and journals against photocopying (Govt. Brief, p. 17, n. 26). The Government thus suggests bypassing an issue which according to the

(c) *Illusory self-limitations.* The purported self-limitations of the libraries are irrelevant and illusory. The factual and legal fallacy of the "single copy" euphemism is shown at pages 40 to 42 of Petitioner's Brief and pages 10–13 of the Authors League Brief. The request must, of course, be in writing (Government Brief, p. 2) and the 40 or 50 page per article limitation applies—except in the case of long articles! (Pet. App. 80–81, Tr. 179A).

Equally illusory is the "widely available" list of certain journals less than five years old (Finding 22(b); Pet. App. 85), a purported source of rejections for photocopying at NLM (not NIH).[10] The list is wholly inapplicable to Government libraries—an exception so wide as to render the rule meaningless. As to non-Government libraries, the list is simply ignored, *inter alia*, "if the requester has been unsuccessful in obtaining the journal elsewhere" (*id*), or in other words, every time it matters.

The Government suggests that the thrust of its libraries' programs is the furnishing of out-of-date articles (Brief, pp. 6, 11, 31). This suggestion is not documented by the record or common experience. Indeed, if the median age of articles from petitioner's journals were three years, as suggested by the Government (Brief, p. 6), then half are less than three years old. These are current journals, particularly in the context of a proprietor's

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Court of Claims majority "must be taken into account" as a factor in finding fair use (Pet. App. 9, 23). The "solid doubt" and "grave uncertainty" of the majority on this issue may be put to rest by the judicial construction of these terms, cited in Chief Judge Cowen's dissenting opinion (Pet. App. 31–33) and in Petitioner's Brief (pp. 46–49) and by the detailed historical analysis contained in the *amicus* brief submitted by the American Guild of Authors and Composers, et al. (pp. 11–16; 23–28). Both judicial comment and history supports the plain meaning of the words used in Section 1(a) of the statute to specify rights; photoduplication is accordingly "copying," "printing," and "reprinting" and, as practiced by NIH and NLM, "publication" as well. Petitioner believes this Court should remove the uncertainty raised by the Court of Claims and confirm such plain meaning.

[10] Petitioner's "widely available" journals have total individual and library subscriptions ranging from 3100 to 7000 (F-5(a); Pet. App. 73; F-7; Pet. App. 76).

right to enjoy his copyright while it is useful (with an outer limit of 56 years).

There is no suggestion that the purported limitations prevent any user from securing a photocopy; in other words, the limitations do not limit.[11]

3. *The xerography revolution*

The Government recognizes that in 1959, "the advent of the xerox machine signaled the start of extensive photocopying" (Brief, p. 30, n. 45). This parallels its statement below that in 1958 "there was virtually no photocopying as presently practiced . . . " (Defendant's Brief in Court of Claims at 46; see also discussion by the Court of Claims majority, Pet. App. 17, 18). These concessions render irrelevant any discussion of the library photocopying situation in 1935 (*e.g.*, Govt. Brief, pp. 17–18) or even earlier (*Id.*, p. 17, n. 26). The two quotations from the so-called "gentlemen's agreement" (at page 18 of the Government Brief) make it clear that an attempt was being made to excuse machine reproduction in 1935 "of a part" of a work when substituting for note taking by hand; rapid, inexpensive copying of entire articles was not yet possible. (See Petitioner's Brief, p. 43, n. 30).

To equate pre-Xerox copying with the post-Xerox copying era is to classify both the slingshot and the atomic bomb as weapons. While in a sense accurate, such an analysis misses the point that the technology has changed the realities.

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[11] The Government has described the photocopying policies of the Library of Congress as to permit copying unless permission is expressly refused by the copyright holder (Govt. Brief, p. 6, n. 16). The evidence on the subject actually in the record is a Library of Congress directive that "copyright material will ordinarily not be copied without the signed authorization of the copyright owner" (F-44, Pet. App. 103). Historical analysis shows that this general rule against photocopying of copyrighted materials has been Library of Congress policy since it commenced operations of its photoduplication service (See Brief of American Guild of Authors and Composers, et al., pp. 25–26).

4. *The fair use defense should not be extended*

A. *A different context*

The Government argues: "This case is very different from those in which the doctrine of fair use is ordinarily involved"[12] (Govt. Brief, p. 16). Petitioner agrees. Fair use has traditionally been considered when a writer quotes from or paraphrases earlier sources. According to the Government, the present situation "involves numerous instances of the single reproduction of a copyrighted work for the individual use of the requestor." (*Id.*). Extension of the fair use defense to this situation is wholly unwarranted. See Petitioner's Brief pp. 19–27; Authors League Brief, pp. 15–23. But these "numerous instances" of reproduction are the equivalent of publication and distribution, petitioner's primary means of serving its public. Such reproduction is concededly "a separate medium for distribution of journal articles." (See Brief of American Library Association, p. 45). Petitioner is in the business of distributing journal articles. There is no reason this particular medium should be exploited by Government libraries free of charge. If such operation is excused by extending the fair use exception to section 1 rights, the exception would consume the rule.

B. *Traditional factors:*

(1) *The purpose of the use and the nature of the copyrighted works.* The Government accurately states: "The copyrighted works are purely scientific. . . ." (Govt. Brief, p. 23). Thus the Government, in effect, concedes that the uses made here are by persons who constitute petitioner's market. The purposes of such uses are the very purposes for which compensation is normally sought.[13] For example, the copies are passed on to

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[12] The American Library Association agrees that the present case "differs from those in which the criteria [of fair use] have heretofore been applied." (American Library Association Brief, p. 35).

[13] Compensation for every use counts, particularly where a universally recognized journal such as *Medicine* has only 4,500 subscribers and a subscription price of $12 for six issues (Tr. 85–86).

others, used to produce further photocopies for colleagues (Tr. 547) or maintained in the ultimate user's files interchangeably with reprints and are even called "reprints" by some users (Tr. 1354).

Nonprofit scientific institutions are petitioner's potential market; accordingly, the nonprofit nature of Government libraries is irrelevant. But in addition, it must be remembered that at least 12% of NLM's "customers" are commercial, profit-making enterprises such as drug companies. Finally, regardless of the admitted social value of the practice of medicine in this country, physicians do not normally operate on a nonprofit basis.

Publication of "purely scientific" journals by respected private groups is in the public interest; the knowledge therein will be effectively disseminated because publication in such journals—as opposed, for example, to the Government Printing Office publications—necessarily bears the stamp of quality (Tr. 909). The financial health of such journals is, accordingly, a matter of public concern.

It is in this context that one must read judicial comment about latitude to science under the fair use doctrine; latitude is accorded a writer of scientific works who should be encouraged to comment upon earlier works.[14]

The Government appears to argue that the very uncertainties created by the decision below will encourage negotiation of voluntary agreements among publishers and libraries (Govt. Brief, p. 25). But the decision below, while by a narrowly divided court, is not at all unclear: As stated by Judge Nichols, the majority decision "[h]owever hedged, . . . will be read, that a copyright holder has no rights a library is bound to respect" (Pet. App. 69). This is because, as discussed above, the holding

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[14] References to such writers and comment dominate the Government's discussions and references on pp. 23–24 of its Brief.

excuses a massive system of photoduplication as "fair use" with no realistic limitations which would dictate a contrary result in other situations.[15]

This is made nowhere clearer than in the detailed discussion by the Government of "systematic reproduction" found in S.1361 passed by the Senate on September 9,1974, and the accompanying Senate Report. (Govt. Brief, p. 34–35, n. 53). The Senate bill seeks to codify the existing law of fair use in Section 107 and then, contrary to the Government's assertion, goes *beyond* fair use in Section 108 to grant specific exemptions to libraries. Such special exemptions, however, do not extend to "systematic reproduction," examples of which are given in SEN. REP. NO. 93–983 93RD CONG. 2D SESS. at 122. The two which the Government dismisses as "plainly inapplicable," apply to NLM. For example, NLM effectively informs medical libraries that it makes photocopies available, so that the receiving library need not subscribe. Moreover, NIH is virtually the prototype for the other example, when it is recalled that the 12,000 users at NIH are being served by the one or two in-house subscription copies through NIH's systematic reproduction activities. Since §108 by its terms would give no special exemption to the libraries in this case, the fair use issue here raised would be determinative even if S.1361 were law.[16]

(2) *The amount and substantiality of the material used.* The Government states that "the amount of photocopying is not large in relation to the total size of the libraries." (Govt. Brief, p. 27). But the criterion as correctly stated earlier by the Government (*Id.*, at 22) is "the amount and substantiality of the material used *in relation to the copyrighted work as a whole.*"

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[15] Other consortiums and networks of libraries will thus be encouraged to proceed without compensating authors and publishers.

[16] Despite the Government's lengthy footnote (Govt. Brief p. 34–35, n. 53), it is believed appropriate to submit to the Court the entire Committee discussion on the subject of multiple copying and systematic reproduction. It is accordingly printed in Appendix B.

[Emphasis added] Under this criterion, the amount is total. Petitioner does not have to argue that "there can be no fair use in such circumstances" (Govt. Brief, p. 28); petitioner rather argues that there never has been any finding of fair use in such circumstances. In any event, the size of the library no more supports a finding of fair use than the size of a book store or publishing house or printing plant which distributes or reproduces copies of copyrighted works without authorization.

(3) *The effect of the use on the potential market for the articles.* Recognizing that "there is no need to show actual damages" generally in copyright infringement cases, the Government argues that the rules are changed when the wand of fair use is waved (Brief, p. 30). Neither the authorities cited nor any other makes "economic injury" a factor relating to fair use; rather, from the time of Mr. Justice Story onward, courts have analyzed the quantity and quality of copyrighted material taken in order to determine whether such use could substitute for the original and thereby affect its potential market (see Petitioner's Brief, pp. 21, 25, 32). It is such a potential, rather than "economic injury" which has been considered relevant to a consideration of fair use.

Actually, petitioner has been harmed and the Trial Judge was correct in so finding.[17] The Government implicitly concedes that photocopying current issues would have an impact on

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[17] The statements dotting pages 30 through 33 of the Government's Brief require corrections too numerous to list. For example, in some discussions petitioner may not have discussed photocopying in connection with the economic losses experienced by *Gastroenterology* (Tr. 97; see Govt. Brief, p. 30, n. 45), but both petitioner and others do ascribe losses and nongrowth of subscriptions, sales of reprints and back volumes, as well as loss of photocopying royalty income to library photocopying—all with a potentially harmful effect on medical journals (Tr. 72–73; 436, 986–87; 1299; 1301–02; Pl. Exh. 34; Def. Exh. 85-5). Neither can one expect NLM's "member libraries" to forsake their archival function and discard out-of-date journals. (Govt. Brief, p. 31, n. 47). Even if they did, they would undoubtedly need microfilm editions which have been licensed by petitioner (F-36, Pet. App. 92).

publishers such as petitioner. But NIH and NLM do copy current issues to a considerable extent. Moreover, the argument that reprint sales "have remained essentially constant at least since 1963" (Government Brief, p. 33) is in itself significant since a dramatic increase would have been expected during this period. Moreover, the NLM director has conceded that the consequences of extensive photocopying services may well be that the researcher finds it necessary to request fewer reprints of articles (Tr. 503).

Much of the "economic" argument of the Government and its *amici* relates to their continuing and unsuccessful effort to show that photocopying does not affect subscriptions.[18] This loses sight of the key fact that many publishers experience a net loss in the normal sale of volumes and recoup only on variant forms of exploitation, i.e., "subsidiary rights." This situation will become increasingly applicable to small scholarly journals such as those involved here.[19] This lawsuit was brought to broaden the fragile base of financial support for such journals by seeking compensation for the particular medium of distribution being exploited by the Government in this case.

If the copying by NLM for libraries throughout the nation and the world and the massive copying by NIH for its large staff is not infringement, then copyright has become a mere shadow instead of a basic right required to give worthy scientific publishers an opportunity to survive.

[18] In defining "systematic reproduction", the Senate Report does not focus solely on substitution of inter-library photocopying for subscriptions; it also refers significantly to "reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies." SEN. REP No. 93-983 *supra* at 122. See A. 3.

[19] Income from licensed photocopying is necessary to recoup losses from library networking. These losses have been recognized in a recent article by a librarian as follows:

"... a growing number of libraries no longer can justify a ballooning periodicals budget and have lavishly cancelled subscriptions and foregone new offerings, depending instead on networks to supply timely and inexpensive photocopies of virtually anything." Gabriel, *Surging Serial Costs: The Microfiche Solution.* Library J. 2450. (Oct. 1, 1974).

CONCLUSION

For all of the reasons stated in Petitioner's Brief and in the foregoing Reply Brief for Petitioner, the judgment of the Court of Claims should be reversed and the case remanded for a determination of reasonable compensation to be paid to petitioner by the Government.[20]

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[20] The Government does not believe it necessary for this Court to decide whether petitioner is the owner of copyright in the articles in its journals (Govt. Brief, p. 12, n. 21). Petitioner believes the Trial Judge correctly decided that petitioner was the owner and that this issue need not be reviewed by this Court. The Trial Judge's finding of petitioner's ownership and right to sue was compelled by petitioner's record ownership, *cf.* Dorr-Oliver, Inc. v. United States, 432 F.2d 447 (Ct. Cl. 1970); Widenski v. Shapiro Bernstein & Co., 147 F.2d 909 (1st Cir. 1945), as well as the presumptions flowing from Section 209 of the copyright statute, *e.g.*, Hedeman Products Corp. v. Tap-Rite Products Corp., 228 F. Supp. 630 (D.N.J. 1964), and is supported by testimony in this case (*e.g.*, Tr. 25, 87, 169, 423), *Cf.* Alexander v. Irving Trust Co., 132 F. Supp. 364 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956) (Presumption that publisher of the "Medical Journal" became proprietor of copyright in article submitted without reservation).

Both parties thus agree this Court may appropriately focus on the infringement and fair use issues raised by this record. These issues would be the same regardless of whether authors or publishers sued (See Authors League Brief, p. 2). Similarly, the license referred to by the Government (Brief, p. 3, n. 3) is completely inapplicable to certain counts in the Court of Claims petition (and is also inapplicable to many other scientific journal articles); accordingly, such license in no way avoids the necessity of resolving the fair use question now or in the future.

APPENDIX A

Letter to the editor, 64 *Gastroenterology* 1059 (1973).

THE AGA AND THE PHOTOCOPYING CONTROVERSY

Dear Sir:

In 1968, the publisher of *Gastroenterology*, The Williams & Wilkins Company, filed suit against the United States Government for infringement of copyrights on its medical journals resulting from unauthorized reproduction by photocopying equipment by the National Library of Medicine. The ruling on this suit by the Commissioner to the Court of Claims on February 16, 1972 in favor of Williams & Wilkins has caused an outpouring of protests from government agencies, biomedical libraries, the editors of other journals, and from members of our own association, all contending that the requirement of a royalty payment or licensing fee to the owner of the copyright would represent an obstruction to the free flow of scientific information to which our own and similar scientific societies are dedicated.

Pending appeal of the Commissioner's ruling to a higher court, Williams & Wilkins had at first proposed to act upon the ruling by (a) raising the journal subscription rate to institutions, and (b) requiring a 5 cents per page fee for interlibrary loan reproduction. The institutional rate was intended to include a "license" to reproduce for these purposes and at the rate specified. The Director of the National Library of Medicine has reacted to these proposals by declarations that he would terminate the Library's subscription to *Gastroenterology* and other Williams & Wilkins journals, and discontinue the indexing of these journals in the Index Medicus. A number of other libraries indicated their intention to terminate their subscriptions.

During the summer of 1972 discussions between Williams & Wilkins and the National Library led to an understanding that the publisher would (1) abandon its stipulation that the new institutional subscription rates include a license to photocopy,

and (2) abandon its proposal for an interlibrary loan fee of 5 cents per page, until the appeal of its case has been heard in the courts. The Director of the National Library of Medicine has informed us that, given this position on the part of Williams & Wilkins, they will continue to subscribe to and index our journal.

The Committee on Publications and Communications of AGA, in reporting to the Governing Board on this matter, found that they shared a grave concern over the threat thus posed to the utilization and the stature of our journal. While holding high respect for our publisher and great confidence, after nearly 30 years of a close working relationship, in his integrity and dedication to scientific interchange, we believe that the use of copyright as a basis for restriction of photocopying would impede the free flow of scientific information in our field, to which our Association is specifically dedicated. We believe that if financial losses can be shown to be attributable to photocopying, they can and should be compensated for by raising rates for institutional subscriptions. We would point out that changes in subscription rates are matters in which we as sponsors of the journal must be consulted and that the surcharge now applied to institutional subscriptions to *Gastroenterology* is modest by comparison with the rates of most other journals. We understand that negotiations are continuing among Williams & Wilkins, the National Library of Medicine, and the Medical Library Association in search of an equitable resolution of the photocopying issue.

The opinions expressed above are a consensus of the Governing Board of AGA, of the members of this Committee, and of the Editorial Board of *Gastroenterology*. Since the Committee is vitally concerned that it reflects the opinions of our membership, we would be pleased to have expressions of opinion on this issue.

THOMAS P. ALMY, CHAIRMAN
Committee on Publications
and Communications
American Gastroenterological Association
Dartmouth Medical School
Hanover, New Hampshire 03755

APPENDIX B

Sen. Rep. No. 93-983, 93rd Cong. 2d. Sess. (1974).

SECTION 108. REPRODUCTION BY LIBRARIES AND ARCHIVES

* * *

Multiple Copies and Systematic Reproduction

Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy", but this section does not authorize the related or concerted reproduction of multiple copies of the same material whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.

Subsection (g) also provides that section 108 does not authorize the systematic reproduction or distribution of copies or phonorecords of articles or other contributions to copyrighted collections or periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

While it is not possible to formulate specific definitions of "systematic copying", the following examples serve to illustrate some of the copying prohibited by subsection (g).

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and that the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators, and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction". Isolated single spontaneous requests must be distinguished from "systematic reproduction". The photocopying needs of such operations as multicounty regional systems, must be met. The committee therefore recommends that representatives of authors, book, and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.

In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, title II of this legislation establishes a National Commission on New Technological Uses of Copyrighted Works. It is the desire of the committee that the Commission give priority to those aspects of the library-copyright interface which require further study and clarification.